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(4)

No. 10-701

IN THE

Supreme Court of the United States

FRANK S. EVANSON,

Petitioner,

v.

SARA R. REEDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Neither Petitioner nor the *amicus curiae* have presented any "compelling reasons" for this Court to grant the Petition for Certiorari ("Petition"). Sup. Ct. R. 10 ("[a] petition for writ of certiorari will be granted only for compelling reasons"). The United States Court of Appeals for the Third Circuit ("Court of Appeals") applied both the correct standard for determining whether a police officer is entitled to qualified immunity for an unlawful arrest in the context of a motion for summary judgment and the law regarding an officer's warrantless testing of a citizen's blood. Accordingly, and despite the Petitioner's assertions to the contrary, the decision of the Court of Appeals did not "depart[ ] so far from the controlling precedents of this Court [nor] so conflict[ ] with other controlling decisions as to require the exercise of this Court's supervisory powers to maintain uniformity of decisions on federal law." Petition at 9.; *see also* Brief in Support of Petitioner's Petition for Writ of Certiorari Filed by Amicus Curiae[1] at 8.

COUNTERSTATEMENT OF THE CASE

On July 14, 2004, Respondent Sara Reedy ("Reedy"), then nineteen years old, was working alone as a cashier at a Gulf Gas Station in Cranberry Township, Pennsylvania, when an unknown male approached her at the store counter. Court of Appeals

1. Brief in Support of Petitioner's Petition for Writ of Certiorari Filed by Amicus Curiae will hereafter be referred to as BAC.

Appendix at 347a, 350a, 353-55a, 460a-62a, 500a-01a. The man removed a black handgun from his pants and ordered Reedy to sit on the floor behind the counter while he removed money from the cash register. *Id.* at 350a, 353a-55a, 460a-62a. He then sexually assaulted Reedy by forcing her to perform oral sex upon him under threat of death. *Id.* at 350a, 353a-55a, 460a-62a, 500a-01a. After the assault, the assailant directed Reedy to the store's rear office where he removed two envelopes of cash from a safe and ordered Reedy to rip the phone lines from the wall. *Id.* 350a, 353a-55a, 460a-62a, 500a-01a. Reedy was ordered to remain in the office for five minutes while her assailant escaped. *Id.* at 354a-55a. After waiting for the assailant to leave the premises, Reedy fled to a nearby service station where an employee called 911. *Id.* at 350a-51a, 354a-55a, 461a, 501a.

The Cranberry Township Police arrived at the scene of the assault and robbery, and Reedy provided detailed information regarding the assault and the assailant to multiple police officers. *Id.* at 350a-55a, 460a-62a. She was subsequently taken to the hospital for treatment, examination, and to gather evidence of the sexual assault. *Id.* at 350a, 354a, 462a. While awaiting treatment, Reedy gave consistent and detailed accounts of the events to the Cranberry Township Police officers and to a nurse who both treated Reedy and performed a "rape kit" on her. *Id.* at 304a-55a, 500a-01a.

Petitioner Frank S. Evanson ("Evanson") was the lead detective assigned to investigate the robbery and assault. *Id.* at 350a-353a. He travelled to the hospital where he confronted Reedy and accused her of fabricating the robbery and assault in order to steal

money to support an alleged, but non-existent, heroin habit. *Id.* at 396a-397a, 462a. Reedy denied the accusation and told the hospital staff that Evanson was accusing her of lying. *Id.* at 396a-397a, 462a, 500a. Evanson, without a warrant or Reedy's consent, directed the hospital to perform toxicology testing on Reedy's blood, which had been drawn during the "rape kit" evaluation. *Id.* at 351a.

In the early hours of July 15, 2004, while Reedy remained at the hospital, Evanson requested that she provide a written statement and mentioned that she might come to the police station the following day. *Id.* at 400a. The next day, July 16, 2004, Reedy travelled to the Cranberry Township Police Station with her mother and stepfather, where she provided a detailed written statement, including information regarding Evanson's inappropriate conduct towards her. *Id.* at 401a-403a, 417a-421a, 446a, 460a-462a. As Reedy wrote her statement, Evanson spoke with her mother and stepfather and indicated that Reedy and her boyfriend were responsible for the theft from the gas station and that the case would shortly be resolved. *Id.* at 447a-450a. Evanson also advised them the he could make things easier for Reedy if she would confess. *Id.* at 447a-450a, 457a.

Evanson and the rest of the Cranberry Township Police focused on Reedy as the suspect in the robbery of the gas station, and they made no effort to locate Reedy's assailant. *Id.* at 350a-359a. On August 17, 2004, Evanson and another detective visited Reedy at her residence and pressured her to change her statement. *Id.* at 406a-409a, 674a. The detectives threatened to jail

both Reedy and her boyfriend for the theft if she did not confess to taking the money. *Id.* at 406a-09a, 674a.

On October 13, 2004, nearly three months after Reedy was attacked, another woman was sexually assaulted and robbed while leaving the Landmark Building in Cranberry Township ("Landmark Attack"). *Id.* at 350a, 505a-507a. The Landmark Attack, which was the only other reported sexual assault in Cranberry Township in 2004, was nearly identical to Reedy's attack and was also investigated by Evanson. *Id.* at 429a-430a, 437a-438a, 505a-507a. During the Landmark Attack, a man with a physical description similar to Reedy's assailant sexually assaulted and robbed a woman while she was leaving work less than two miles from the location of Reedy's attack. *Id.* at 347a-355a, 502a-514a, 515a-516a. In addition to the physical description of the assailant and the location of the assault, the Landmark Attack bore several additional similarities to the attack on Reedy: both assailants used a black handgun; both attacks occurred at the same time of night; both victims were robbed and sexually assaulted; and both victims were required to perform the same sex act. *Id.* at 347a-355a, 502a-514a.

In January 2005, six months after Reedy was assaulted and three months after the Landmark Attack, Evanson began drafting an Affidavit of Probable Cause for Reedy's arrest. *Id.* at 349a, 707a-714a. Evanson sent a draft version to the local assistant district attorney, William Fullerton. *Id.* at 693a-694a, 707a-714a. Fullerton skimmed the draft and advised Evanson to revise it before he would take the time to review it in detail. *Id.* at 695a-696a, 725a. In addition, Fullerton informed

Evanson that he needed to include a description of the evidence that made out the elements of a crime and asked Evanson about the charges he intended to file. *Id.* at 695a-96a, 725a. Although Fullerton expected to review another draft of the Affidavit before charges were ultimately filed, Evanson neither sent a revised draft nor answered Fullerton's questions regarding what charges he would seek. *Id.* at 697a-699a, 702a. Fullerton never saw the final Affidavit or any other version of the documents filed against Reedy until after Evanson had lodged them with the local magistrate. *Id.* at 699a-700a, 703a-704a. Evanson, moreover, did not add additional information or evidence to the final version of the Affidavit. The changes he made consisted primarily of removing large portions of information from the draft Affidavit. *Id.* at 708a-714a, 224a-226a.

On January 14, 2005, Evanson learned from the Pennsylvania State Police that the Landmark Attack was linked to other similar attacks throughout Pennsylvania that were believed to have been committed by a serial rapist. *Id.* at 511a-512a, 609a. On the same day, now six months after Reedy's assault, Evanson filed a Criminal Complaint and Affidavit of Probable Cause against her. *Id.* at 221a-226a.

The Affidavit asserted only the following:[2]

(1) On July 14, 2004, Reedy reported to Robert McGee that she had been attacked and robbed by an unknown assailant. *Id.* at 191a.

2. Reedy has always maintained "that the Affidavit not only lacked probable cause on its face, but that it contained material

(Cont'd)

(2) Reedy provided McGee with a description of the assailant but was unsure of the direction in which the assailant left the area or a description of his vehicle. *Id.* at 191a-192a.

(3) Corporal Mascellino of the Cranberry Township Police Department transported Reedy and her boyfriend to the hospital. *Id.* at 192a.

(4) Reedy provided Evanson and Mascellino with a description of the assailant and the details of the robbery that began at 10:40 p.m. *Id.* at 192a-194a.

(5) Prior to leaving the hospital, Reedy agreed to provide a written statement to the police on July 15, 2004. *Id.* at 194a.

(6) Evanson attempted but was unable to contact Reedy for several days beginning on July 15, 2004. *Id.* at 194a.

(7) Evanson spoke with Carol Hazlett, the manager of the Gulf Gas Station, and learned that the power for the store's alarm system was interrupted that night and the security company

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falsehoods and omissions." Petitioner's Appendix at 29a. The District Court "agreed with Reedy that . . . the Affidavit suffered from recklessly-made false statements and omissions[,]" *id.* at 31a, and Evanson did "not directly challenge the District Court's findings of false statements and omissions" before the Court of Appeals, *id.* at n. 24.

unsuccessfully attempted to contact the store. *Id.* at 194a-195a.

(8) Hazlett returned to the store, learned of the robbery and assault, and found that the power cord for the alarm system had been unplugged. *Id.* at 195a.

(9) Reedy's statement regarding the assailant pressing the "No Sale" key matched the time indicated on the register tape. *Id.* at 195a-196a.

(10) Hazlett advised Evanson that $606.73 was taken during the robbery. *Id.* at 196a.

(11) On July 23, 2004, Evanson met with Reedy and her mother to discuss the alleged assault and robbery. *Id.* at 196a.

(12) Evanson asked Reedy if she pulled any other wires during the attack and Reedy stated that she only disabled the telephone. *Id.* at 196a.

(13) Evanson asked Reedy if the assailant disabled the electricity for the alarm system and Reedy advised that he did not. *Id.* at 197a.

(14) Evanson told Reedy that the security company reported that the power failed for the security system at 10:14 p.m. and Reedy stated that she did not know how this occurred. *Id.* at 197a.

(15) When Evanson told Reedy that the power failed as a result of the power cord in the rear office being unplugged and questioned how this would

have occurred, Reedy became verbally abusive and stated that she "just wanted to drop the whole thing." *Id.* at 197a.

(16) When Evanson told Reedy that the matter could not be dropped, Reedy became agitated and stated, "I just want this whole thing to go away." *Id.* at 198a.

(17) Detective Meyer learned that Mark Watt and Reedy had contacted David Kriley in mid-July regarding renting a trailer with a monthly rental fee of $365.00 and a security deposit in the same amount. *Id.* at 198a.

(18) On July 19, 2004, Watt and Reedy applied to rent the mobile home and listed on the initial application that Catholic Charities would pay $200.00 of the security deposit and Watt and Reedy would pay the remaining $165.00. *Id.* at 198a-199a.

(19) On July 20, 2004, Watt paid the remaining $165.00 of the security deposit in cash. *Id.* at 199a.

Based on this Affidavit, Reedy was charged with three crimes arising out of the incident at the Gulf Gas Station: theft, receiving stolen property, and making false reports to law enforcement authorities. *Id.* at 222a.

Reedy was notified that a warrant had been issued for her arrest and promptly surrendered to the authorities at the local magistrate's office on January

19, 2005. *Id.* at 149a. Her cash bond was established in the amount of $5,000.00. *Id.* Unable to post bond, Reedy was taken into custody and spent five days in jail awaiting a bail reduction hearing. *Id.*

Reedy's criminal trial was scheduled to begin in September 2005. *Id.* at 149a. In August, Wilbur Brown was apprehended by another police force while assaulting a female convenience store clerk in Brookville, Pennsylvania. *Id.* at 149a-150a, 199a, 219a. Brown confessed to both the attack on Reedy and the Landmark Attack. *Id.* at 149a-150a, 219a. The charges against Reedy were dropped by the district attorney's office on September 1, 2005. *Id.* at 150a.

On August 14, 2006, Reedy filed a Complaint in the United States District Court for the Western District of Pennsylvania ("District Court") against Evanson and others. *Id.* at 61a-79a. In March 2008, she filed an Amended Complaint alleging § 1983 claims of unlawful search for the testing of her blood, unlawful seizure, false imprisonment, malicious prosecution, harm to liberty interest, and a variety of state law claims. *Id.* at 98a-115a. Evanson filed a Motion for Summary Judgment on July 1, 2008, arguing, among other things, that probable cause existed to arrest Reedy and/or that he was entitled to qualified immunity with respect to the arrest. *Id.* at 164a-167a.

In ruling on the Motion for Summary Judgment, the District Court agreed with Reedy that the Affidavit of Probable Cause filed by Evanson contained both false statements and material omissions. *Id.* at 20a-27a. As a result, the District Court reconstructed affidavit and

used the "Corrected Affidavit" to determine the existence of probable cause and qualified immunity. *Id.* at 20a-31a. The District Court nonetheless found that the Corrected Affidavit demonstrated probable cause for Reedy's arrest and/or that Evanson was entitled to qualified immunity. Evanson's Motion for Summary Judgment was granted on March 31, 2009. *Id.* at 3a-6a.

Reedy timely appealed, and the Court of Appeals vacated in part, reversed in part, and affirmed in part. Petitioner's Appendix[3] at 4a. Relevant to the instant Petition, the Court of Appeals explained, among other things, that when reviewing a grant of summary judgment, all facts must be viewed "in the light most favorable to the non-moving party, who is 'entitled to every reasonable inference that can be drawn from the record.'" *Id.* at 23a. (quoting *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000)). With respect to qualified immunity, the Court of Appeals noted that a defendant police officer will not be entitled to summary judgment "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue . . . ." *Id.* at 55a. (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The Court of Appeals concluded that the District Court had applied the correct approach to deciding qualified immunity in the context of a summary judgment motion, but had, among other things, acted contrary to the summary judgment standard when it "failed to consistently interpret the record in the light most

3. Petitioner's Appendix will hereafter be referred to as Pet.Appx.

favorable to Reedy." *Id.* at 36a. Accordingly, the Court of Appeals held that

> [v]iewing the facts in the light most favorable to Reedy, no reasonably competent officer could have concluded at the time of Reedy's arrest that there was probable cause for the arrest. In addition, summary judgment on Evanson's defense of qualified immunity cannot stand. The availability of the defense must be decided after fact finding by the jury to determine whether the facts as recounted by Evanson or by Reedy are more credible.

Id. at 75a. Further, the Court of Appeals determined that Evanson should not have received summary judgment for the testing of Reedy's blood. *Id.* at 71a. Such testing constituted a "warrantless search . . . for drug use, without Reedy's consent, [and] violated the Fourth Amendment." *Id.*

REASONS FOR DENYING THE PETITION

Evanson has advanced three arguments for this Court to grant the Petition and enter a writ of certiorari. Petition at i. First, he, along with the *amicus curiae*, contends that the Court of Appeals improperly applied the doctrines of summary judgment and qualified immunity. *Id.* Second, Evanson briefly argues that the Court of Appeals held that qualified immunity only exists for law enforcement personnel when they make difficult, split-second decisions. *Id.* Lastly, Evanson asserts that the Court of Appeals wrongly determined that he was not entitled to summary judgment for the warrantless

testing of the Reedy's blood. *Id.* None of those arguments have merit. No compelling reasons have been presented for this Court to review the decision of the Court of Appeals.

I. THE COURT OF APPEALS PROPERLY ARTICULATED AND APPLIED THE STANDARD FOR DETERMINING WHETHER EVANSON WAS ENTITLED TO QUALIFIED IMMUNITY AT SUMMARY JUDGMENT.

At summary judgment, courts, as the Court of Appeals correctly articulated and explained, must view the facts "in the light most favorable to the non-moving party[,]" Pet.Appx. at 23a (quoting *Merkle*, 211 F.3d at 788), and if faced with a claim of qualified immunity, use those facts to determine whether a "reasonably competent officer would have concluded that a warrant should issue," *id.* at 55a (quoting *Malley*, 475 U.S. at 341). Evanson and the *amicus curiae* take a contrary position, one that fails to recognize the clearly established interplay between the doctrines of summary judgment and qualified immunity. Evanson's primary contention is that, in the context of a false arrest claim, no precedent "indicates that the historical facts for the arrest or for the arrest warrant affidavit are to be viewed in a light most favorable to the arrestee to determine probable cause and qualified immunity." Petition at 13.

That proposition is clearly contradicted by well established law. In fact, this Court addressed a claim of qualified immunity at summary judgment in *Saucier v. Katz*, 533 U.S. 194 (2001), a case upon which Evanson

relies. Although finding immunity to be proper in the circumstances presented, this Court explained that "[a] court required to rule upon the qualified immunity issue must consider, then, this threshold question: **Taken in the light most favorable to the party asserting the injury,** do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201 (emphasis supplied); *see also id.* (noting that where a constitutional "violation could be made out on a **favorable view of the parties' submissions,**" courts must examine whether the violated constitutional right was clearly established (emphasis added)).

Other decisions of this Court also demonstrate that the facts used for determining qualified immunity at summary judgment must be taken in the light most favorable to the non-moving party. In *Scott v. Harris*, 550 U.S. 372 (2007), a decision absent from Evanson's argument, this Court stated, when discussing whether a law enforcement officer's conduct violated the Fourth Amendment in a § 1983 case, that

> [t]he first step in assessing the constitutionality of [the officer's] actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's versions of events (unsurprisingly) differs substantially from [the officer's] version. When thing are in such a posture, **courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'**

> **In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of events.**

Scott v. Harris, 550 U.S. 372, 378 (2007) (emphasis added and citations omitted); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987) (explaining that on remand in a civil suit for an alleged Fourth Amendment violation at the summary judgment stage, "it should first be determined whether **the actions the [plaintiffs] allege [the officer] to have taken** are actions that a reasonable officer could have believed lawful . . . [, and i]f they are, the[officer] is entitled to dismissal" (emphasis added)).

Prior decisions from the Court of Appeals follow the standards established in *Saucier* and *Scott*. *See Merkle*, 211 F.3d at 788-90 (explaining that "[i]n addressing a motion for summary judgment, **the facts must be viewed in the light most favorable to [the non-moving party], and she is entitled to every reasonable inference that can be drawn from the record**" and that after "[v]iewing the facts in the light most favorable to [the non-moving party] . . .[, t]he question therefore becomes **whether a reasonable person in [the officer's] position could have concluded, based on this knowledge, that [the non-moving party] had committed a crime**" (emphasis added)); *see also Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000) (noting that in an unlawful arrest case, when deciding whether qualified immunity applies at summary judgment, courts "arrange the facts in the light most favorable to the plaintiff, and then determine whether, given precedent, those 'facts,' if true, would constitute a deprivation of a right").

Other courts of appeals have also explained that "[i]f the facts, construed as they must be in [a] summary judgment appeal in the light most favorable to the plaintiff, show that a constitutional right has been violated, another inquiry is whether the right violated was clearly established . . . [because b]oth elements . . . must be present for an official to lose qualified immunity." *Brown v. City of Huntsville*, 608 F.3d 724, 734 (11th Cir. 2010)(quotation marks and citation omitted); *see also Reardon v. Wroan*, 811 F.2d 1025, 1030 (7th Cir. 1987) (finding defendants "not entitled to qualified immunity" at summary judgment because it "[wa]s clear [their] conclusions with respect to the existence of probable cause could be found to be objectively unreasonable when the facts are viewed in the light most favorable to plaintiffs").

Accordingly, support for the analysis performed by the Court of Appeals exists in the decisions of this Court, the Court of Appeals itself, and other courts of appeal. Despite citing numerous cases, Evanson and the *amicus curiae* have failed to locate any that require, or even suggest, that courts not view the facts in the light most favorable to the non-moving party when deciding a claim of qualified immunity at summary judgment. The cases upon which they rely fall into four categories, none of which support granting the Petition. First, they cite criminal cases that do not involve summary judgment or qualified immunity. *See Ornelas v. United States*, 517 U.S. 690 (1996); *Franks v. Delaware*, 438 U.S. 154 (1978); *Hill v. California*, 401 U.S. 797 (1971); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Arvizu*, 534 U.S. 266 (2002). Second, they direct this Court's attention to civil cases not involving summary judgment.

See Malley, 475 U.S. at 335; *Baker v. McCollan*, 443 U.S. 137 (1979); *Carswell v. Borough of Homestead*, 381 F.3d 235 (3d Cir. 2004); *Johnson v. Campbell*, 332 F.3d 199 (3d Cir. 2003). Third, they rely on cases that, while involving summary judgment and qualified immunity, do not have facts in dispute. *See Wright v. City of Philadelphia*, 409 F.3d 595, 599 (3d Cir. 2005) ("[t]he material facts here are not in dispute . . . [and t]he issue before us is the purely legal question of whether the facts alleged, even in the light most favorable to [the non-moving party], were legally sufficient to establish probable cause for her arrest"); *see also Orsatti v. New Jersey State Police*, 71 F.3d 480, 481 (3d Cir. 1995) ("[b]ecause we find that the undisputed material facts of record establish that it was objectively reasonable for the officers to conclude that they had probable cause to arrest . . . , we hold that the officers are immune from" suit); *Bartholomew v. Commonwealth of Pennsylvania*, 221 F.3d 425 (3d Cir. 2000); *Paff v. Kaltenbach*, 204 F.3d 425 (3d Cir. 2000). Finally, they cite to cases which actually stand for the proposition that at summary judgment, facts are to be viewed in the light most favorable to the non-moving party when addressing qualified immunity. *See Anderson*, 483 U.S. at 646 n. 6; *Saucier*, 533 U.S. at 201; *Wilson*, 212 F.3d at 786; *Merkle*, 211 F.3d at 788-90; *Wright*, 409 F.3d at 603 (although "[l]ooking at the facts in the light most favorable to [plaintiff]," the court determined that the officers were entitled to qualified immunity at summary judgment).

Notwithstanding Evanson's claim to the contrary, *see* Petition at 10-13 (arguing that the Court of Appeals "completely ignored" all of the cases Evanson cites), many of those opinions were actually used by the Court

of Appeals in reaching its decision, *see* Pet.Appx. at 23a (citing *Merkle*), 25a (citing *Orsatti*), 29a (citing *Wilson*), 31a (citing *Franks*), at 53a (citing *Wright*) 54a (citing *Saucier*) & 55a (citing *Malley*). In fact, the District Court, which Evanson and the *amicus curiae* laud as following the correct analysis, *see* Petition at 10, also cited many of the same cases and recognized the interplay between summary judgment and qualified immunity as discussed above. Relying on *Wilson*, the District Court explained that its task was to "arrange the facts in a light most favorable to the plaintiff, and then determine whether, given precedent, those 'facts,' if true, would constitute the deprivation of a right." Pet.Appx. at 127a (quoting *Wilson*, 212 F.3d at 786).

There is no dispute among courts regarding the proper standard to apply when determining qualified immunity at summary judgment. The Court of Appeals articulated and followed the correct analysis by assessing whether a reasonable police officer could have found probable cause to arrest Reedy when the facts were viewed in her favor. It faulted the District Court not for using the wrong legal standard, but for misapplying that standard. *Id.* at 36a (explaining that the District Court "failed to consistently interpret the record in the light most favorable to Reedy and instead, contrary to the summary judgment standard, occasionally adopted interpretations that were least favorable to [her]").

Because the necessary legal inquiry is not truly in dispute, the motive behind the arguments of Evanson and the *amicus curiae* becomes clear: they are unhappy with the results of the Court of Appeals' analysis, not the analytical approach itself. *See* Petition at 10-21.

Under such circumstances, this Court should not grant the Petition. Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

II. THE COURT OF APPEALS NEVER HELD THAT QUALIFIED IMMUNITY SHOULD BE RESTRICTED TO SITUATIONS REQUIRING DIFFICULT, SPLIT-SECOND DECISIONS.

Evanson indicates that he believes that the Court of Appeals erroneously limited the application of qualified immunity to situations "requiring difficult, split-second decisions." Petition at i (listing the Questions Presented in the instant Petition). Although he never separately argues such in the Petition, he does, during the argument regarding the interplay between summary judgment and qualified immunity, briefly state, "[T]he Court of Appeals offered no acceptable justification for its unique view that qualified immunity was unavailable to [him], because 'qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions,' and no such situation existed in this case." *Id.* at 13 (quoting Pet.Appx. at 56a n. 37). To the extent Evanson has properly advanced this argument for the Court's consideration, it should not serve as a basis for granting the Petition.

The Court of Appeals never, as Evanson implies, stated that qualified immunity could only exist when difficult, split-second decisions were made. By its plain meaning, the Court of Appeals' language merely

describes one of the rationales for the existence of the qualified immunity doctrine. *See* Pet.Appx. at 56a n. 37 ("qualified immunity exists, in part, to . . . ."). The Court of Appeals' correctly noted that rationale. *See Gilles v. Davis*, 427 F.3d 197, 207 (3d Cir. 2005) (explaining that qualified immunity affords police officers "a certain amount of deference" because "[t]hey must make 'split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving'" (citation omitted)). Nonetheless, the Court of Appeals explained that it reached its conclusion, not on the lack of a split-second judgment, but because "'no reasonably competent officer would have concluded that a warrant should issue' when it did for [Reedy's] arrest[,]" Pet.Appx. at 55a-56a (citation omitted).

Accordingly, there is no merit to the contention that the opinion of the Court of Appeals limited the application of qualified immunity to those situations where law enforcement personnel must make difficult, time sensitive decisions. To the extent Evanson actually advances such an argument, it does not support granting the Petition here.

III. THE COURT OF APPEALS PROPERLY DETERMINED THAT EVANSON WAS NOT ENTITLED TO SUMMARY JUDGMENT FOR THE WARRANTLESS SEARCH OF REEDY'S BLOOD.

Before the Court of Appeals, Reedy argued that the District Court had wrongly concluded that Evanson "conducted an unreasonable, warrantless search of her blood by ordering the drug screening." Pet.Appx. at 57a.

In response, Evanson did "not argue that he had a warrant to search [the] blood, but rather argue[d] that Reedy consented to the search, or alternatively, that she had no reasonable expectation of privacy in her blood because it had left her body." *Id.* The Court of Appeals, noting that "the issue [wa]s that [Evanson] had conducted a warrantless search[,]" *id.* at 57a n. 39, determined that a right of privacy clearly existed, *id.* at 57a-71a, and that, relying on *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *Ferguson v. City of Charleston*, 308 F.3d 380 (4th Cir. 2002), Reedy had not consented to the testing because she did not understand, at the time her blood was taken for the "rape kit," that it could be "tested for the law enforcement purpose of obtaining incriminating evidence against her[,]" Pet.Appx. at 70a.

Evanson now contends, without significant analysis or argument, that the Court of Appeals' handling of the "blood test claim" is contrary to this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), and the Court of Appeals' own decision in *Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000). Petition at 22. According to Evanson, "[t]he collection and use of blood samples by the police without a warrant has been upheld for decades. . . . [and t]he tests must be reasonable and conducted within a reasonable amount of time." *Id.* In addition, Evanson baldly asserts that the consent forms that Reedy signed at the hospital "were broad enough to permit [him] to ask for additional testing of the blood sample that was given to the police." *Id.* Those arguments fail to demonstrate compelling reasons to grant the Petition.

In *Schmerber*, this Court permitted the warrantless blood draw and testing of an individual suspected of driving under the influence of alcohol. 384 U.S. at 758, 771-72. The Court noted, however, that blood "testing procedures plainly constitute searches[,]" *id.* at 767, that "warrants are ordinarily required for searches . . . and, absent an emergency, no less could be required where intrusions of the body are concerned[,]" *id.* at 770. Only because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops" did this Court determine that an emergency situation existed and that, consequently, a warrant need not have been obtained in that case. *Id.* at 770-71. This Court's holding was specifically limited to the facts before it. *Id.* at 772. Relying on *Schmerber*, the Court of Appeals in *Hedges* also found no constitutional infirmity for a blood-alcohol test. 204 F.3d at 120.

Accordingly, *Schmerber* and *Hedges* stand for the proposition that a right of privacy exists not only in the drawing of one's blood, but also its testing, and that a warrant to do either must issue absent exceptional circumstances. Evanson makes no argument that the emergency concerns of *Schmerber* and *Hedges* exist in this case. Reedy's blood had already been drawn as part of a "rape kit" and thus was preserved. Pet.Appx. at 9a. Nothing prevented Evanson from seeking a warrant for the blood's testing.[4] Thus, the Court of Appeals decision is not in contravention of the *Schmerber* or *Hedges* opinions.

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4. Indeed, Evanson successfully sought and obtained a warrant for the Reedy's medical records, which contained the results of the toxicology exams he ordered. Pet.Appx. at 9a.

Evanson has also failed to demonstrate that the Court of Appeals improperly determined that Reedy did not consent to the blood testing. Indeed, he has not attempted to explain the way in which the Court of Appeals wrongly concluded that the consent forms did not authorize the testing done. He merely asserts, without citation, that the "Court of Appeals' reliance on the *Ferguson* cases is misplaced . . . [because t]hose cases did not involve fluid samples given to the police and consent forms broadly authorizing testing of those samples." Petition at 22. Notably, the instant matter also "did not involve fluid samples given to the police." Reedy's blood was drawn by the hospital, tested at Evanson's order by the hospital, and the results of that testing were later obtained by Evanson from the hospital. Pet.Appx. at 9a. Accordingly, Evanson has done nothing but misrepresent the record to show that the Court of Appeals incorrectly determined that Reedy failed to consent to having her blood tested.

As a result, the Court of Appeals handling of the "blood test claim[,]" Petition at 22, provides no basis for this Court granting the Petition. Evanson has not shown any compelling reason for doing so.

CONCLUSION

For all of the foregoing, Evanson and the *amicus curiae* have not established any compelling reasons for this Court to grant the Petition. Therefore, Reedy respectfully requests that the Petition be denied.

Respectfully submitted,

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